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OCBC BANK MALAYSIA BHD

v.

METROPLEX BHD

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COURT OF APPEAL, PUTRAJAYA
JEFFREY TAN JCA
ABDUL WAHAB PATAIL JCA
LINTON ALBERT JCA
[CIVIL APPEAL NO: W-02-1932-2010]

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26 MAY 2011

CIVIL PROCEDURE: *Judgments and orders - Enforcement of - Leave to institute proceedings - Application for - Whether appellant could be granted leave to present a separate winding up petition - Whether*

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appellant could gain advantage over other creditors if leave granted - Whether leave should not be refused - Companies Act 1965, s. 226(4)

CIVIL PROCEDURE: *Winding up - Petition - Application for leave to present separate winding up petition - Whether appellant could be granted leave to present a separate winding up petition - Whether*

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appellant estopped from presenting separate winding up petition when it had supported the instant winding up petition - Whether appellant could gain advantage over other creditors if leave granted - Whether leave should not be refused - Companies Act 1965, s. 226(4)

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This appeal arose from the dismissal of a motion (encl. 308) by the appellant for leave to institute proceedings for the enforcement of a judgment obtained by the appellant against the respondent, including the presentation of a winding-up petition against the respondent. Briefly, the facts showed that on 4 March 2002, the

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appellant obtained judgment against the respondent in the sum of RM42,610.12. However, the appellant could not capitalise on that judgment, as the respondent had obtained a succession of restraining orders under s. 176(10) of the Companies Act 1965. Meantime, on 13 April 2005, one Morgan Stanley Emerging

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Markets Inc (Morgan) presented the instant winding up petition (instant petition) against the respondent, which petition was supported by the appellant. On 15 May 2007, the respondent was delisted from the Official List of Bursa Malaysia. On 27 April 2010, the appellant served a s. 218 notice on the respondent and

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demanded payment of the judgment sum from the respondent. Soon thereafter, the appellant filed the instant motion for leave to present a separate winding-up petition against the respondent. The grounds upon which the appellant had grounded its application for

leave were that the court had granted leave to another creditor (Affin Bank Berhad) to present a winding-up petition against the respondent, as such the appellant should be granted leave too to present a separate winding-up petition, and that the winding-up petition of Morgan remained unresolved despite the passage of five years. The respondent's arguments were, *inter alia* (i) the appellant had not shown that it had a proprietary claim and that the appellant, who was an unsecured creditor, should not, over other creditors, be given the advantage of leave to present a separate winding-up petition; (ii) that the appellant who had supported the instant winding-up petition was thereby estopped from presenting a separate petition.

Held (unanimously allowing the appeal)
Per Jeffrey Tan JCA delivering the judgment of the court:

(1) The circumstances in which leave to proceed may be appropriate are not closed, and courts have an absolute discretion in deciding whether or not to grant leave. That discretion should not be fettered. In the instant case, the appellant had supported and tagged along with the instant petition. Despite the passage of five long years and for whatever reasons, the instant petition had not even reached the stage when it would be heard or soon heard. At the same time, it would not seem that the appellant could step into the shoes of Morgan, as the petitioner under r. 33 of the Companies (Winding-Up) Rules 1972. Since there was no timely resolution of the instant petition, it did not appear that the remedy that the appellant sought could be soon given in the instant petition. (para 13)

(2) Under the circumstances, it was not right to shackle the appellant to the instant petition or to the pace of prosecution of the instant petition. Rather, where others had failed, the appellant ought to be given a fair shot at it, to wind up the respondent (s. 226(4) Companies Act 1965). No advantage could be gained by the appellant over other creditors if leave were to be granted. On the other hand, to refuse leave would condemn the appellant only to wait without an end in reasonable sight. All things considered, leave, if that were indeed required, ought not to be refused. It should not result in the refusal to the appellant to proceed with a separate winding-up petition. That result was unjust when the facts wholly narrated the instant motion not to be turned down. Thus, leave was granted to the appellant to present a separate winding-up petition against the respondent. (paras 13 & 14)

Bahasa Malaysia *Translation Of Headnotes*

Rayuan ini timbul daripada penolakan usul (lamp. 308) oleh perayu untuk kebenaran memulakan prosiding bagi penguatkuasaan penghakiman yang diperolehi oleh perayu terhadap responden, termasuk membentangkan petisyen penggulungan terhadap responden. Secara ringkas, fakta-fakta menunjukkan bahawa pada 4 Mac 2002, perayu telah memperolehi penghakiman terhadap responden dalam amaun RM42,610.12. Walau bagaimanapun, perayu tidak mengambil tindakan ke atas penghakiman itu, kerana responden telah memperolehi beberapa perintah-perintah pencegahan di bawah s. 176(10) Akta Syarikat 1965. Sementara itu, pada 13 April 2005, satu Morgan Stanley Emerging Markets Inc (Morgan) telah membentangkan petisyen penggulungan semasa (petisyen semasa) terhadap responden, yang mana petisyen tersebut telah disokong oleh perayu. Pada 27 April 2010, perayu telah menyerahkan notis s. 218 ke atas responden dan menuntut bayaran jumlah penghakiman daripada responden. Kemudiannya, perayu telah memfailkan usul semasa untuk kebenaran membentangkan perintah penggulungan yang berasingan terhadap responden. Alasan-alasan yang diberi oleh perayu bagi permohonan untuk kebenaran adalah mahkamah telah memberikan kebenaran kepada lagi satu pemiutang (Affin Bank Berhad) untuk membentangkan petisyen penggulungan terhadap responden, dan oleh itu perayu harus diberikan kebenaran juga untuk membentangkan petisyen penggulungan yang berasingan dan petisyen penggulungan Morgan masih tidak dapat diselesaikan walaupun sudah lima tahun berlalu. Hujahan-hujahan responden pula adalah, antara lain (i) perayu tidak menunjukkan bahawa ia mempunyai tuntutan proprietari dan perayu, yang merupakan pemiutang tidak bercagar, tidak harus, melebihi pemiutang-pemiutang yang lain, diberi kesempatan kebenaran membentangkan petisyen penggulungan berasingan; (ii) perayu yang telah menyokong petisyen penggulungan semasa sepatutnya diestop daripada membentangkan petisyen berasingan.

Diputuskan (sebulat suara membenarkan rayuan)
Oleh Jeffrey Tan HMR menyampaikan penghakiman mahkamah:

(1) Keadaan-keadaan di mana kebenaran untuk meneruskan adalah sesuai tidak ditutup, dan mahkamah mempunyai budi bicara mutlak dalam memutuskan sama ada untuk memberi kebenaran. Budi bicara itu tidak harus terbelenggu. Di dalam kes ini, perayu telah menyokong dan mengikut bersama-sama petisyen

semasa. Walaupun tempoh lima tahun telah berlalu dan atas apa jua sebab pun, petisyen semasa tidak pun sampai ke peringkat di mana ia boleh didengar atau akan didengar. Pada masa yang sama, ia tidak kelihatan bahawa perayu boleh mengambil alih tempat Morgan, sebagai pempetisyen di bawah k. 33 Kaedah-Kaedah (Penggulungan) Syarikat 1972. Kerana tiada resolusi yang tepat pada masanya berhubungan petisyen semasa itu, ia tidak kelihatan bahawa remedi yang dipohon perayu boleh segera diberikan dalam petisyen semasa itu.

(2) Dalam keadaan-keadaan sedia ada, perayu tidak seharusnya dibelenggu dengan petisyen semasa atau mengikut rentak pendakwaan petisyen semasa. Sebaliknya, di mana orang lain telah gagal, perayu harus diberi peluang adil, untuk menggulungkan responden (s. 226(4) Akta Syarikat 1965). Tiada kelebihan yang boleh diperolehi oleh perayu ke atas pemiutang-pemiutang yang lain jika kebenaran diberikan. Sebaliknya, keengganan memberikan kebenaran akan menjejaskan perayu dengan membiarkan perayu menunggu tanpa kesudahan yang munasabah. Dengan semua perkara dipertimbangkan, kebenaran, jika diperlukan, tidak harus ditolak. Ia tidak sepatutnya mengakibatkan langkah perayu meneruskan dengan petisyen penggulungan yang berasingan ditolak. Dapatan itu tidak adil apabila fakta-fakta menunjukkan bahawa usul semasa itu tidak seharusnya ditolak. Oleh itu, kebenaran diberikan kepada perayu untuk membentangkan petisyen penggulungan yang berasingan terhadap responden.

Case(s) referred to:

Chatib Kari v. Mosbert Bhd [1984] 2 CLJ 30; [1984] 1 CLJ (Rep) 501 HC ***(refd)***

Langley Constructions (Brixham) Ltd v. Wells [1969] 1 WLR 503 ***(refd)***

Maril-Rionebel (M) Sdn Bhd & Anor v. Perdana Merchant Bankers Bhd & Other Appeals [2001] 3 CLJ 248 CA ***(refd)***

Mosbert Bhd (in liquidation) v. Stella D'Cruz [1985] 1 LNS 47 FC ***(refd)***

Perbadanan Pengurusan Bella Vista v. CA Management Services Sdn Bhd [2009] 3 CLJ 161 HC ***(refd)***

Sinarlim Sdn Bhd v. Waja Destinasi (M) Sdn Bhd [2012] 3 CLJ 678 CA ***(refd)***

Sun Microsystems (Malaysia) Sdn Bhd v. KS Eminent Systems Sdn Bhd [2000] 4 CLJ 72 HC ***(refd)***

Legislation referred to:

Companies Act 1965, ss. 176(10), 218, 226(3), (4)

Companies (Winding-Up) Rules 1972, rr. 28, 33

Other source(s) referred to:

Andrew R Keay, *McPherson's Law of Company Liquidation*, 2nd edn, 2009, Thomson Reuters, pp 377, 378, 380, 381

BH Lawrence, *The Law of Company Liquidation*, 2nd edn, p 71

J O'Donovan, *McPherson The Law of Company Liquidation*, 3rd edn, Law Book Company, p 183

For the appellant - Tan Gian Chung; M/s Shook Lin & Bok

For the respondent - Wong Rhen Yen (Kenwayne Goik with him); M/s Dennis Nik & Wong

Reported by Suhainah Wahiduddin

JUDGMENT

Jeffrey Tan JCA:

[1] This appeal arose from the dismissal of a motion (encl. 308 in Kuala Lumpur D4-28-258-2005) by the appellant for leave "to institute proceedings for the enforcement of judgment dated 4 March 2002 obtained by the (appellant) against the respondent including the presentation of a winding-up petition against the respondent.

[2] It is not in dispute that on 4 March 2002 the appellant obtained judgment against the respondent in the sum of RM42,610,361.12 together with interests and costs. But the appellant could not capitalise on that judgment, as the respondent had obtained a succession of restraining orders under s. 176(10) of the Act that restrained "further proceedings in any action or proceeding against the company except by leave of the court and subject to such terms as the court imposes" until 21 October 2004. A fifth application for the same said restraining order was dismissed on 30 November 2004. Meantime, on 2 November 2004, one Morgan Stanley Emerging Markets Inc (Morgan) presented a winding-up petition against the respondent, which petition had the support of the appellant. But on 12 January 2005, Morgan withdrew that petition. On 13 April 2005, Morgan presented the instant winding-up petition (instant petition) against the respondent. On 22 December 2006, provisional liquidators was appointed to work with the management of the respondent "to formulate and present a composite group wide scheme of arrangement pursuant to s. 176 of the Act" and "to endeavour to preserve the listing status of the respondent and to facilitate continued trading in the shares of the respondent". But all plans

to preserve the listing status of the respondent were practically torn asunder on 15 May 2007, when the respondent was delisted from the Official List of Bursa Malaysia. Quite undaunted, the respondent on 15 May 2007 obtained a fresh restraining order under s. 176 of the Act. But that fresh restraining order was set aside on 3 April 2009. A year later, on 27 April 2010, the appellant served a s. 218 notice on the respondent, and demanded payment of the judgment sum from the respondent. Soon thereafter, the appellant filed the instant motion for leave to present a separate winding-up petition against the respondent, which motion, as said, was dismissed on 11 June 2010.

[3] The grounds upon which the appellant had grounded its application for leave were that on 20 October 2008 and then on 18 November 2009 the court had granted leave to another creditor (Affin Bank Berhad) to present a separate winding-up petition against the respondent and as such the appellant should be granted leave too to present a separate winding-up petition, and that the winding-up petition of Morgan remained unresolved despite the passage of five years from the date of its presentation.

[4] The respondent had resisted the motion on various grounds, all of which were held by the court below as technical and bereft of arguable merit, save for the following. On the contention by the respondent that there would be a multiplicity of proceedings if leave were granted to the appellant, the court below held, on the basis supposed of *Chatib Kari v. Mosbert Bhd* [1984] 2 CLJ 30; [1984] 1 CLJ (Rep) 501 and *Mosbert Bhd (in liquidation) v. Stella D'Cruz* [1985] 1 LNS 47, that "it was incumbent on the appellant to show that their claim cannot be adequately dealt with in the winding-up or the remedy the appellant seeks cannot be given in the winding-up proceedings" (see p. 24 of the Appeal Record). The court below further held the appellant had not provided any authority in support of the proposition that delay in the disposal of a winding-up petition was a ground for the grant of leave under s. 226(3) of the Act (see 25AR). For those essential reasons, the court below held that the instant circumstance was not within any of the two categories stated in *The Law of Company Liquidation* by BH Lawrence (1980) 2nd edn p. 71 for the grant of leave under s. 226(3) of the Act, and duly dismissed the motion of the appellant for leave (see 22AR read together with 24AR and 25AR).

[5] Before us, the respondent argued that the appellant had not shown that it had a proprietary claim, in the sense that it had a claim to its own property, or shown that the balance of convenience was such that the claim of the appellant could not be easily dealt with in the instant winding-up petition, that the appellant, who was an unsecured creditor, should not, over other creditors, be given the advantage of leave to present a separate winding-up petition, that the appellant who had supported the instant winding-up petition was thereby estopped from presenting a separate petition, that delay in the disposal of the instant winding-up petition was no ground for the grant of leave, and that a separate winding-up petition by the appellant would add to multiplicity of proceedings and to legal costs.

[6] In relation to the argument that the appellant had supported the instant winding-up petition and was thereby estopped from presenting a separate petition, and that a separate petition would add to multiplicity of proceedings and to legal costs, the court below held that the notice of intention to appear by the appellant, be it to support or oppose the petition, was to enable the appellant to appear on the hearing of the petition, and that more than one winding-up petition could be presented against a company. On that, we entirely agree with the court below. In order to appear on the hearing of the instant winding-up petition, the appellant was required by r. 28 of the Companies (Winding-Up) Rules 1972 to serve a notice of intention to appear in Form 8 on Morgan. Without service of that Form 8, the appellant would not be allowed to appear on the hearing of the petition (see *Perbadanan Pengurusan Bella Vista v. CA Management Services Sdn Bhd* [2009] 3 CLJ 161, and *Sun Microsystems (Malaysia) Sdn Bhd v. KS Eminent Systems Sdn Bhd* [2000] 4 CLJ 72) without special leave of the court. The function of that Form 8 was to give notice to Morgan of the person/s who would support or oppose the petition on the hearing. Together, that Form 8 and Form 9 functioned only to facilitate the preparation of a list of the persons who would attend the hearing of the petition. That Form 8 could not operate as a bar to the presentation of a separate petition by the appellant.

[7] The existence of the instant winding-up petition could also not be any reason to dismiss any second winding-up petition, for "more than one petition may be presented against a company" (*Maril-Rionebel (M) Sdn Bhd & Anor v. Perdana Merchant Bankers Bhd & Other Appeals* [2001] 3 CLJ 248, 259 per Gopal Sri Ram JCA, as he then was).

[8] In *Maril-Rionebel*, the main ground of complaint was that there was, at the date on which the respondent presented its winding-up petition, another petition already in existence presented by another creditor. There, it was contended by the appellant, who had failed to set aside the winding-up petition and had appealed to the Court of Appeal, that a second winding-up petition is bad as a matter of law, and that the presentation of two petitions constitutes an abuse of process. The respondent responded that the point of view that the presentation of more than one petition is frowned upon for multiplicity is wrong. Gopal Sri Ram JCA, who delivered the main judgment of the court, agreed wholeheartedly with the respondent.

(Counsel for the respondent) relied on in support of his conclusion, in particular *Re Norton Iron Co* [1877] 47 LJ Ch 9. I find myself persuaded by these arguments. My reasons are reflected sufficiently from the judgment of the second authority cited to us by Mr Abraham. Contrary to his argument, it is a decision that clearly supports Mr Rasa Ratnam's submission. The case is *Ladli Parshad Jaiswal v. Karnal Distillery Co Ltd* [1954] 24 Comp Cas 77, where at p. 81, Dulat J, discussed the English cases on the point:

> Mr Khanna, appearing for the respondent, while admitting that two or more identical suits by the same person were maintainable even in the same court, contended that the case of winding up applications is peculiar, and that once a winding up application has been filed and it is a *bona fide* application, a second application of the same kind for the winding up of the same company does not lie. He was unable, however, to support this argument either on the basis of any principle of law or any authority. Mr Khanna did refer to three English decisions, *In re Joint Stock Coal Company* [1869] LR 8 Eq 146 *In re Norton Iron Coy* [1877] 47 LJ Ch 9 and *In re Building Societies' Trust Limited* [1890] 44 Ch D 140, but none of these afford any assistance to his argument. In these cases, the question mainly was of costs. *In re Joint Stock Coal Company* there were two petitions for the winding up of the same company and both failed because neither disclosed any good ground for a winding up order. The learned Vice-Chancellor disposes of the merits of the two petitions at p. 153 of the report, and then after considering another question proceeds to consider the matter of costs at p. 154 and decides:
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> > As to the second petition, by the shareholders of Norwich, I am not sure if theirs had been the original petition for winding up that I should have dismissed it with costs, because they have a fair ground of complaint in the

A discontinuance of the Norwich depot. But when it is considered that Green's petition had already been presented, and that the Norwich shareholders well knew all that was being done, there was no excuse under the circumstances for presenting a second petition, and it must consequently be dismissed with costs.

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It will be noticed that the second petition was not dismissed because of the existence of the first petition. In the next case, *In re Norton Iron Company*, the second petition was dismissed because the first was allowed, and a winding up order was made on that first petition. In the last case, *In re Building Societies' Trust Limited*, again one of the petitions was allowed and the other thereupon dismissed. It is clear therefore that in none of these cases was a winding up petition dismissed merely because another winding up petition of the same kind was awaiting decision. This matter concerning the position of several petitions for the winding up of the same company was considered in *In re European Banking Company, ex p Baylis* [1866] LR 2 Eq 521 and Sir RT Kindersley VC, observed:

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> However desirable it is to avoid a number of petitions being presented for the winding up of a company, I am not aware of any rule having been established with a view to limit the number of them. But still, every one of these petitions ought to be looked at separately upon its own merits as if it were the only petition presented.

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It is not shown that this view has been departed from in the English courts. There is thus no authority for concluding that the appellant's petition for the winding up of this company is not maintainable because a previous petition by him of a similar kind is pending and has not yet been decided. On general grounds too there appear several considerations why the appellant should not be debarred from seeking his remedy in this court merely because another court of competent jurisdiction is yet considering a similar prayer by him. The company in question is admittedly an Indian company, and as from the date of the partition, the responsibility for deciding disputes, connected with its affairs, rests on this court. If therefore a party seeks relief from this court in connection with such a dispute, feeling that he can obtain effective relief from this court alone, such relief ought not to be refused on any but substantial ground. The old maxim of law is that a judge must extend his jurisdiction, which of course does not mean that he should usurp jurisdiction where none exists, but does mean that he ought to amplify as far as possible the remedies he can grant.

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> **There you have it. I require no clearer authority for the proposition that more than one winding up petition may be presented against a company**. Of course, the provisions of r. 33 are available to a petitioning creditor. And if he does not take advantage of that rule to have himself substituted for a lethargic petitioner, he may find himself out of pocket for his costs. **But on no account is his petition bad in law. Nor is it an abuse of the court's process**. (emphasis added)

[9] Section 226(3) of the Act was not raised in argument in *Maril-Rionebel*. That however was not so in *Sinarlim Sdn Bhd v. Waja Destinasi (M) Sdn Bhd* [2012] 3 CLJ 678, where the appellant presented a winding-up petition at the Ipoh High Court in 2007 when there already existed a winding-up petition at the Kuala Lumpur High Court in 2005. It was argued that since a winding–up petition already existed in 2005, the Ipoh winding-up petition could not be presented without leave under s. 226(3) of the Act. On appeal, issues 2 and 3 were whether the winding-up petition in the Ipoh High Court was valid when there already existed a similar petition against the same respondent at the Kuala Lumpur High Court on which no order had yet been made, and whether the Ipoh winding-up order was validly made when there was an earlier winding-up order at the Kuala Lumpur High Court but which order had been stayed. The Kuala Lumpur High Court was of the view that there could not be more than one winding-up petition against the respondent at any one time. Speaking for the entire court, Ramly Ali JCA wholly disagreed with that proposition.

> With respect, this court cannot agree with the learned judge on this point. It is a settled legal principle that in law there is nothing against the filing of more than one winding-up petition against the same company at any one time. There is no leave required for the filing of the second and subsequent winding-up petitions if the company has not been wound up yet. However, the court must stress that at no time a company which has been wound up can subsequently be wound-up again.
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> This matter concerning the position of several petitions for the winding-up of the same company was considered in *In re European Banking Company: Ex parte Baylis* [1866] LR 2 Eq 521 where Sir RT Kindersley VC, observed:
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> … (see above)
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> The above proposition was adopted and followed by Dulat J in *Ladli Prasad Jaiswal v. Karnal Distillery Co Ld* [1954] Comp Cas 77, where he held:
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> … (see above)

A The above principle was accepted and followed by the Court of Appeal in *Maril-Rionebel (M) Sdn Bhd & Anor v. Perdana Merchant Bankers Bhd & Other Appeals* [2001] 3 CLJ 248, where it was held by Gopal Sri Ram JCA, *inter alia*, that:

> B I require no clearer authority for the proposition that more than one winding-up petition may be presented against a company. Of course, the provision of r. 33 is available to a petitioning creditor. And if he does not take advantage of the rule to have him substituted for a lethargic petitioner, he may find himself out of pocket for his costs. But on no C account is his petition bad in law. Nor is it an abuse of the court's process.
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> The above authorities clearly support the findings of this court that the Ipoh High Court winding-up petition filed on 5 January 2007 is valid in law, even though at the time of filing there was D another winding-up petition earlier filed and pending in the KL–D2 High Court. **No leave is required for such filing under s. 226(3) of the Companies Act 1965**. (emphasis added)

[10] In all fairness, the court below had not the benefit of the E judgment of the Court of Appeal in *Sinarlim Sdn Bhd*. Even so, the court below had the benefit of *Maril-Rionebel* where it was categorically held by the Court of Appeal that a second (or multiple) winding-up petition may be presented against a company, and that a second winding-up petition is not bad in law F nor is it an abuse of the court's process. It is true that *Maril-Rionebel* had not explicitly considered s. 226(3) of the Act. But *Maril-Rionebel* was still nonetheless the closest to the instant motion, both in terms of fact and law, while *Mosbert v. Stella D'Cruz*, even though pronounced by the apex court, and *Chatib Kari v. Mosbert*, which was followed by the court below, G concerned claims to land. While both latter cases had to do with leave to commence actions *in rem*, the instant motion was for leave to present a separate winding-up petition. Those applications were as different as chalk and cheese. The instant motion was for leave to present a separate winding-up petition. The issue was H whether leave was necessary, and if so, then should it be granted pursuant to s. 226(3) of the Companies Act 1965 (Act) which reads:

> I When a winding up order has been made or a provisional liquidator has been appointed no action or proceeding shall be proceeded with or commenced against the company except:
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> (a) by leave of the court; and
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> (b) in accordance with such terms as the court imposes.

[11] *McPherson's Law of Company Liquidation* by Andrew R Keay 2nd edn (published in 2009 by Thomson Reuters) at p. 377 expressed the view that "there appears to be no distinction drawn between these two terms (action and proceeding). The former is a generic term and means civil litigation for the recovery of individual rights". The Court of Judicature Act 1964 provides that an "action means a civil proceeding commenced by writ or in such other manner as is prescribed by rules of court, but does not include a criminal proceeding" and that a "proceeding means any proceeding whatsoever of a civil or criminal nature and includes an application at any stage of a proceeding". Widgery LJ in *Langley Constructions (Brixham) Ltd v. Wells* [1969] 1 WLR 503 indicated that the word "proceeding" should be given a wide meaning. Nevertheless, "it has been held that lodging an appeal and applying for security for costs against the company are not proceedings for which leave of the court is required. (Section 226) does extend to counterclaims, proceedings of a statutory penalty and the process directed against the property of a company such as levying execution or distress, enforcing a garnishee order, starting an action *in rem*, or applying for interpleader relief or establishing or exercising a mortgagee's right pursuant to property legislation as well as arbitration proceedings against the company" (*McPherson's Law of Company Liquidation* by Andrew R Keay 2nd edn *ibid* at p. 378). "(Section 226) does not state when leave to proceed will be granted. It is not possible to state exhaustively all of the circumstances in which leave to proceed may be appropriate. The courts have an absolute discretion in deciding whether or not they will grant leave to proceed and an appellate court will not readily interfere with the exercise of a discretion … there has not been … much examination as to when leave will be granted. It has been said that courts are to do what is right and fair in all of the circumstances. Other factors which have said to have been important in determining whether leave should be granted are, according to McPherson J: 'the amount and seriousness of the claim, the degree of complexity of the legal and factual issues involved, and the stage of which the proceedings, if already commenced, may have progressed' … and whether any action would prejudice the other creditors" (*McPherson's Law of Company Liquidation* by Andrew R Keay 2nd edn *ibid* at pp. 380 - 381).

[12] Both *McPherson The Law of Company Liquidation*, 3rd edn by J O'Donovan (published by the Law Book Company) at p. 183, and *McPherson's Law of Company Liquidation* by Andrew R Keay 2nd edn *ibid* at 381 observed that "cases in which the

court have granted leave to commence or continue proceedings against a company in liquidation can be readily resolved into two principal categories. In one the determining factor has been the nature of the plaintiff's claim; in the other, the balance of convenience and the demands of justice". That latter passage was certainly noted by the court below (see 23AR). But it was overlooked by the court below that that aforesaid observation by the aforesaid learned authors was made in relation to claims and not in relation to a separate winding-up petition where there was a merger of the claim of the appellant with what was now a final judgment, and that the aforesaid learned authors had not stated that courts cannot grant leave to circumstances outside those two principal categories. It was also overlooked by the court below that *Mosbert v. Stella D'Cruz* concerned an action *in rem* and that the pronouncement of the Federal Court, namely that "the court will always give an applicant leave if his claim cannot be dealt with adequately in the winding-up or if the remedy he seeks cannot be given to him in a winding-up proceeding" was made in relation to an application for leave to commence an action *in rem*. In the result and with respect in error, the court below had confined itself only to the aforesaid two principal categories.

[13] As said, the circumstances in which leave to proceed may be appropriate are not closed, and courts have an absolute discretion in deciding whether or not to grant leave. That discretion should not be fettered. Courts must do what is right and fair in all of the circumstances. In the instant case, the appellant had supported and tagged along with the instant petition. Therefore, clearly, the appellant had deferred to the provisions of s. 226(3) of the Act. It could not be denied that the remedy that the appellant sought could be given in the instant petition, that is, only if the instant petition were heard in the first place. But it would not seem that there could be any early prospect of that. Despite the passage of five long years and for whatever reasons, the instant petition had still not been resolved. As a matter of fact, the instant petition had not even reached the stage when it would be heard or soon heard. At the same time, it would not seem that the appellant could step into the shoes of Morgan, as the petitioner under r. 33 of Companies (Winding-Up) Rules 1972. It was such that there was yet no light at the end of the tunnel on the timely resolution of the instant petition, it should not appear that the remedy that the appellant sought could be soon given in the instant petition. Under the circumstances, it should not seem right to shackle the appellant to the instant petition or to the pace of prosecution of the instant petition. Rather, where others had

failed, the appellant ought to be given a fair shot at it, to wind-up the respondent. After all, s. 226(4) provides that "an order for winding-up a company shall operate in favour of all the creditors and contributories of the company as if made on the joint petition of a creditor and of a contributory". The primary object of winding-up "is the collection and distribution of the assets of the company *pari passu* amongst unsecured creditors after payment of preferential debts" (*Mosbert v. Stella D'Cruz* per Seah FCJ). Hence, no advantage could be gained by the appellant over other creditors if leave were to be granted. On the other hand, to refuse leave would condemn the appellant only to wait without an end in reasonable sight. All things considered, leave, if that were indeed required, ought not to be refused. Of course, if leave were not required (*Maril-Rionebel* clearly implied that leave is not required), then there was no reason to dismiss the instant motion. In either case, it should not result in the refusal to the appellant to proceed with a separate winding-up petition. That result was unjust when the facts wholly warranted the instant motion not to be turned down.

[14] For those reasons, we unanimously allow this appeal with costs, and grant leave (even if leave were not required, no harm would be caused by the grant of it) to the appellant to present a separate winding-up petition against the respondent.